IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Civil Revision Application No. 51 of 2015

Muhammad Aslam & others **…** ***Applicants***

v e r s u s

The District Officer, Community Development & others **…** ***Respondents***

Date of Hearing: 29.11.2018

Date of Decision: 29.11.2018

Mr. Vinod Kumar Jesrani, advocate for applicants.

Mr. Abdul Hamid Bhurgri, Additional Advocate General.

O R D E R

KHADIM HUSSAIN TUNIO, J- Through this Revision Application, applicants/plaintiffs have challenged the judgment dated 11.06.2015 and decree dated 11.06.2015, passed by IV-Additional District Judge Larkana, in Civil Appeal No.38/2014, whereby he allowed the said Civil Appeal and set-aside the judgment and decree passed by learned trial court dated 26.10.2013 and remanded the suit of the applicants/plaintiffs bearing F.C Suit No.65 of 2012 (Old F.C. Suit No.80 of 2012). The applicants/plaintiffs have prayed for setting aside the impugned judgment passed by the learned IV-Additional District Judge Larkana and restoration of judgment and decree of the learned IVth Senior Civil Judge Larkana whereby the suit of the applicants/plaintiffs was decreed.

2. Brief facts of the case are that the applicants/plaintiffs filed F.C Suit No.65/2013 (Old F.C Suit No.80/2012) against the defendants/respondents for declaration, possession, compensation, permanent and mandatory injunction. They have prayed in the suit that the earlier predecessor namely late Ghulam Nabi had, in interest of applicants, filed a F.C. Suit No.45 of 1991, re: Ghulam Nabi and others Vs. Mst. Zaibunissa and others, for the reliefs of Declaration, possession and perpetual injunction in respect of suit land i.e. 50 paisas share in S.No.53(4-35) acres, measuring (2-17½) acres, situated in deh Lahori, taluka Larkana, which was dismissed vide judgment and decree dated 31.05.1994 and 05.06.1994 but maintained in Appeal vide judgment and decree dated 27.10.1997 and 18.11.1997. Then reversed in Civil Revision by this court vide judgment dated 15.10.1994. After that the defendant/respondent No.2 i.e. the Peoples Municipality Larkana being aggrieved filed Leave to Appeal before Honourable Supreme Court of Pakistan which was dismissed on 09.10.2006, hence the judgment dated 15.10.2004 passed by this Court attained finality, through which the above said suit was decreed. Thereafter the present plaintiffs/applicants filed Execution proceedings No.01 of 2007, re: Mohammad Aalam and others versus Mst. Zaibunissa and others in which learned executing court ordered for handing over the possession of the suit property involved in that suit, which was materialized through bailiff on 09.09.2009. But it was found that to some extent on the site some portion from the above said property is occupied by the above said respondents/defendants No.1 to 3, where some part of the hockey ground is built and such mutation in revenue record was also effected

on 08.04.2011. Thereafter, the plaintiff/applicant No.1 approached the concerned revenue authorities from time to time for measurement and pointation of the said area at the site, as the applicants were not handed over their whole property, then a team to that effect was constituted, who took the measurement and then the Mukhtiarkar gave such report through letter dated 13.02.2012. That after verification and measurement at the site, it was clearly found by the said team and shown in letter dated 13.02.2012 that an area of 58671 Sq. ft. from total area of 1,06,177 Sq. Ft. is available as an open plot and an area of 47,506 Sq. Ft is under Khuhro Complex but virtually an area of 50,177 Sq. Ft. from the original S. No.53 (4-35) area, deh Lahori is under Khuhro Complex, the suit property illegally occupied and used by the defendants/respondents No.1 to 3, hence under the circumstances the plaintiff/applicant No.1 approached the defendants/respondents No.1 and 2 for vacating the above said area in question and to pay the due compensation for its use and occupation but to no avail as they declined to do the needful, on the contrary threatened to put him in hot waters being Government functionaries and to hand over the possession to some other department. Thereafter, the plaintiffs/applicants also got a legal notice dated 25.08.2011 claiming their right and redressal but, however, the defendants/respondents No.1 and 2 replied the said notice on 06.09.2011 disputing the right and title of the plaintiffs. The applicants/plaintiffs left with no alternative, filed the F.C. Suit with following prayers:-

> a. To declare that the plaintiffs are owners and title holders of the suit property shown in para 5 of

memo of plaint, as observed in the judgment dated 15.10.2004 passed by High Court and the defendants No.1 to 3 have got no tile, interest or whatsoever in the suit property and also to declare that the said defendants are in its illegal possession, occupation and use.

b. To order for dispossession of the defendants No.1 to 3 and award vacant possession of the suit property to the plaintiffs.

c. To order for appointment of a suitable persons as commissioner to adjudge the rate and amount of compensation, to be paid by the defendants No.1 to 3 for its use since date of occupation and Rs.50,000/- per month from date of filing of this suit and onwards for its illegal occupation and use of the suit property, to the plaintiffs, till actual delivery of the possession, to be handed over to the plaintiffs.

d. To issue perpetual injunction against the defendants No.1 to 3 restraining them from alienating, creating third party interest and handing over the possession of the suit property to any body else, except the plaintiffs.

e. To issue mandatory injunction against the defendants No.1 to 3, ordering them to pay Rs.50,000/- per month to the plaintiffs for use and occupation of the suit property.

f. Award costs of the suit to the plaintiffs.

g. Any other equitable relief, which the court deems fit and proper may be granted to the plaintiffs.

3. The defendants/respondents No. 1 & 2 were served and filed their written statements. However, defendant Nos. 3 and 4 were ordered to be proceeded as *ex parte*.

4. After hearing the parties counsel, learned trial court decreed the suit vide judgment and decree dated 26.10.2013. The defendants/respondents being aggrieved filed Civil Appeal No.38/2014 before the Appellate Court. After hearing the parties, the said appeal was allowed vide impugned judgment dated 11.06.2015

and decree dated 18.06.2015. The plaintiffs/applicants being aggrieved by said judgment and decree preferred instant civil revision application.

5. Learned counsel for the applicants/plaintiffs argued that impugned judgment and decree passed by learned appellate court is result of improper appreciation of facts and law; that appellate court has not considered the material points raised by the applicants and point of limitation as the appeal was barred by more than 100 days; that learned appellate Judge has not considered the adjournment applications moved by defence and the case diaries of learned trial court; that impugned judgment and decree is result of non-reading, mis-reading, improper exercise of jurisdiction excess of jurisdiction and improper appreciation to the law and facts.

6. Learned counsel for the Respondents submits that the impugned judgment passed by the learned Appellate Court is sound and speaking; that he has recorded proper reasons and rightly remanded the suit of the applicants/plaintiffs while setting aside the judgment & decree of trial court, therefore present Civil Revision Application may be dismissed.

7. Learned state counsel argued in the same line as argued by the counsel for respondents.

8. I have heard the learned counsel for either of the parties and have perused the relevant record with their assistance.

9. A perusal of the record and judgments/orders reveals that the learned trial court decreed the suit on the basis of technicalities

while in *ex parte*. No illegality has been pointed out by the applicant in the learned appellate court's judgment. The respondent Nos. 3 & 4 were not served summons as provided under the provisions of Order V Rule 10-A, Order V Rule 27 C.P.C & Order XXVII Rule 4. Further, court motion notice was also not issued nor served upon the respondent/defendant Nos. 2 to 4 by the transferee court who later on ordered that the suit be proceeded as *ex parte* against the defendants and decreed the suit without providing opportunity of hearing, though the valuable rights of the parties are involved in the matter. Furthermore, the Deputy District Attorney was not assigned the matter in dispute by the District Attorney Larkana to plead the same on behalf of the Government of Sindh. Further, after remand of the case, the defendant No. 1 filed his written statement on 16.09.2015 as Exh.04 and the same was adopted by the D.D.A on behalf of defendant No. 2. The photocopy of Deh form 1 of Lands Register, map of Deh Lahori, letter dated 03.08.1980, photocopy of *ghat-wadh* form, photocopy of *otara*, list of survey numbers, photocopy of notifications, photocopy of complex, photocopy of map of complex, photocopy of demarcation report of mukhtiarkar/team and photocopy of authority letter of defendant No. 2 in the name of defendant No. 1 have been annexed with the written statement.

10. Not only this, the appellate court had the discretion to dismiss or allow the appellant's appeal. Discretion is a power conferred on the court, not a duty. The "*discretion"* must be a sound one, to be exercised in accordance with tenets of justice and fair play, keeping in mind the circumstances obtaining in each case. Technicalities, however, must be avoided. The law abhors

technicalities that impede the cause of justice. As mentioned by the appellate court, the appellant could have been punished, but not so severely that his right to contest the matter is taken away. The court's primary duty is to render or dispense justice and court has to decide where a technicality deserts its proper office as an aid to justice or becomes its great hindrance and chief enemy. Litigations must be decided on merits and not on technicalities and the same should not be a game of technicalities. Therefore, decree of the suit purely on technical grounds is frowned upon where the policy of the court is to encourage hearing of cases on their merits. Rules of procedure should not be applied in such a rigid, inflexible and technical sense that it defeats substantial justice. A litigation is not and should not be a game of technicalities. Therefore, let it be emphasized that the rules of procedure should be viewed as mere tools designed to facilitate the attainment of justice. Their strict and rigid application, which would result in technicalities that tend to frustrate rather than promote substantial justice, must always be eschewed.

11. When technicalities are pitted against substantial justice, such technicalities will have to yield. Such was the view of the Indian Apex Court in the case of ***Collector, Land Acquisition, Anantnag v. Mst. Katiji*** reported in ***AIR 1987 SC 1353***, wherein the court held that:-

> *"4. When **substantial justice** and **technical considerations** are pitted against each other, cause of substantial justice **deserves to** be **preferred** for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay."*
>
> *(emphasis supplied)*

Similar view was taken by the Hon'ble Supreme Court of Pakistan in case titled as ***Manager, Jammu & Kashmir State Property v. Khuda Yar*** reported in ***PLD 1975 SC 678*** wherein it was stated that mere technicalities, unless offering any insurmountable hurdle should not be allowed to defeat the ends of justice and the logic of words should yield to the logic of realities. Therefore, in view of the foregoing jurisprudential trend to afford every party litigant the amplest opportunity for a just determination of his case, free from the severities of technicalities; the *prima facie* merits of the pleadings, the Appellate Court rightly set-aside the order of the Trial Court.

12. In the light of above discussion and circumstances, by my short order dated 29.11.2018, present Civil Revision Application was dismissed. The judgment dated 11.06.2015 passed in Civil Appeal No.38 of 2014 was upheld. The Trial Court was directed to decide the case expeditiously and dispose of the same preferably within a period of six (06) months.

These are the reasons for my short order.

J U D G E